Supreme Court, U.S.
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No. 01-0002

In The

Supreme Court of the United States

JOHN ECHEVARRIETA,

Petitioner,

vs.

THE CITY OF RANCHO PALOS VERDES, a Municipal Corporation; THE CITY OF RANCHO PALOS VERDES CITY COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District Division Four

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should certiorari be granted to determine whether a compensable taking results from a local land use regulation that limits the height at which foliage may be maintained, that does not single out one landowner but applies generally to all property in the city, where the regulation

- does not impose a liability retroactively but merely regulates the height of existing, present and future landscaping; and
- has minuscule or no impact on the value of Petitioner's property and does not affect Petitioner's primary, "essential use" of his valuable residential property?

THE PARTIES

Petitioner John Echevarrieta is the Petitioner herein, was the Petitioner and Appellant below and is a residential property owner in the City of Rancho Palos Verdes, California. Respondent City of Rancho Palos Verdes is a municipal corporation organized and existing under and by virtue of the general laws of the State of California. The City of Rancho Palos Verdes City Council is not an independent legal entity, but is by law the legislative body of the City of Rancho Palos Verdes, the members of which are duly elected by the registered voters in the City of Rancho Palos Verdes.

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OPINIONS BELOW

The Opinion of the California Court of Appeal, Second Appellate District, Division Four, as modified, is cited as 86 Cal.App.4th 472, 103 Cal.Rptr.2d 165 (2001) and is included here as Appendix 1. The California Supreme Court denied review on March 21, 2001. The City of Rancho Palos Verdes City Council's resolution (Resolution No. 98-21) affecting Petitioner's property is included here as Appendix 2.

STATEMENT OF THE CASE

Petitioner's Statement of the Case portrays facts inaccurately and asserts as fact suppositions that are both absent from the record before the state courts and false. In so doing, Petitioner invites this Honorable Court to disregard the factual determinations of the California courts and sit as a trier of fact *de novo*. After reviewing a voluminous Administrative Record of proceedings before the City's View Restoration Commission and the City Council, the California Court of Appeal determined the salient facts.

The subject view protection ordinance ("Ordinance") was adopted by voter initiative in 1989. The Ordinance prohibits property owners from allowing and maintaining foliage growth that "significantly impairs" a "view," as carefully defined by the Ordinance.

Petitioner claims that residents were encouraged to plant tall trees when homes were constructed in the

1960s. Petition, p. 4. Although that assertion is of questionable significance to the present petition, this Honorable Court should be informed that the record before the California courts contains no support for that assertion. Moreover, whatever "encouragement" Petitioner may have imagined in 1964, the City did not "reverse its position" (Petition, p. 4) by adopting the Ordinance as Petitioner claims. In fact, the City did not exist in the 1960s and was not incorporated until 1973. *See, Curtis v. Board of Supervisors*, 7 Cal.3d 942 (1972) (California Supreme Court held state law governing municipal incorporation was unconstitutional, thus allowing organizers of the "proposed City of Rancho Palos Verdes" to proceed with incorporation).

Apart from Petitioner's various factual misrepresentations, the Court of Appeal's Opinion summarizes the pertinent facts. Under the Ordinance, a property owner adversely affected by a significant view impairment may apply for a view restoration permit, after attempting informal consultation and resolution with the foliage owner. The Ordinance establishes the View Restoration Commission to conduct public hearings on view restoration permits, take evidence and render findings in accordance with the Ordinance. The City Council hears appeals. App. 1, p. 2.

Petitioner's neighbor, Mr. Keilbach, applied for a view restoration permit regarding eight trees on Petitioner's property that blocked Mr. Keilbach's view of the Pacific Ocean and Catalina Island. Several hearings were conducted by the View Restoration Commission and the City Council, and the matter was remanded once to the View Restoration Commission to render further hearings

and findings regarding specific concerns raised by Petitioner. Ultimately, the City Council affirmed a decision of the View Restoration Commission finding that Petitioner's foliage significantly impairs Mr. Keilbach's view and requiring Petitioner to eliminate the significant view impairment by trimming or topping the obstruction. As allowed by the Ordinance, the City's decision called for the remedial work to be performed at Mr. Keilbach's expense, and for Mr. Keilbach to provide replacement foliage at his expense to serve as a privacy barrier, thus placing the economic burden of compliance with the regulation on Mr. Keilbach and mitigating any economic burden to Petitioner.

The Ordinance has an insignificant impact on Petitioner's property value. The Court of Appeal found it "even questionable" whether Petitioner's property value was diminished, and aptly observed that it may be enhanced by the City's regulation. App. 1, p. 11, 12.

Appellant filed a Petition for Writ of Administrative Mandate in the Los Angeles County Superior Court challenging the City's decision as exceeding the City's police power, preempted by state property law and constituting an unconstitutional taking of property. After considering a voluminous Administrative Record and numerous briefs and arguments, the Superior Court denied the Petition. On appeal, the Petitioner abandoned his police power and preemption arguments and contended instead that the City's action violated the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitutions and analogous provisions of the California Constitution. The unanimous panel of Division Four of the California Court of Appeal for the

Second Appellate District affirmed the judgment of the trial court. The California Supreme Court denied Petitioner's Petition for Review.

REASONS TO DENY THE WRIT

I.

THIS PETITION PRESENTS NO BONA FIDE ISSUE OF PUBLIC IMPORTANCE

Nothing in the Court of Appeal's Opinion justifies a grant of certiorari by this Honorable Court. Indeed, Petitioner's characterization of the case as "rarely litigated" (Petition, "Questions Presented" p. i) reveals the lack of general interest and importance this matter carries. Petitioner's contention that the Opinion below conflicts with existing precedent is based on Petitioner's misunderstanding and mischaracterization of this Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Similarly, Petitioner's suggestion that the Court of Appeal's Opinion in this case somehow licenses local government to take and convert property for public use by physical means represents a complete distortion of the Opinion below and the record upon which it was based.

Correctly decided as the Opinion is, it does not represent a landmark decision. At most, the reach of the Opinion below may extend to view preservation ordinances governing residential foliage height in California jurisdictions that have imposed such regulations. There is no reason to suppose that this insignificant decision of an

intermediate appellate tribunal will guide the development of Takings Clause jurisprudence outside of California. There is no reason to suppose that the decision, which cites and relies on the cases of this Honorable Court and of the California Supreme Court, somehow might be applied by other California courts to upset such precedent.

Moreover, the scarcity of cases involving view protection ordinances itself reveals that jurisdictions that have adopted such regulations are few and far between. The Court of Appeal's Opinion has no significance whatsoever to anyone but the smattering of local jurisdictions involved in view preservation. Even in the State of California – which includes hundreds of local governmental legislative bodies having local jurisdiction over land use, and league upon league of scenic coastline and alpine mountain range of which many a view may be enjoyed – there are probably no more than a handful of municipalities that have proposed view protection measures. Petitioner's own assertion that the law in most jurisdictions does not recognize view protection undermines any assertion that this Petition presents any substantial or important question.

In proper perspective, the instant Petition presents no issue warranting a grant of certiorari. Stripped of Petitioner's grandiose claims of importance, the Petition does nothing more than ask the United States Supreme Court to review an intermediate appellate court for error. But the Opinion below is not erroneous.

II.

THE COURT OF APPEAL'S OPINION DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*

Petitioner's charge that the Opinion conflicts with *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) is wrong. Petitioner is the owner and occupant of a single family residence located on the subject property. That property is zoned for single family residential use. Neither the City's Ordinances nor the Court of Appeal's Opinion deprives Petitioner of that use or interferes with continuing that use. The Ordinance in question merely regulates the minor and incidental matter of foliage height.

Lucas, in contrast, presented this Court with a state statute "which had the direct effect of barring petitioner from erecting any permanent habitable structures" on his property, along with a state trial court finding that the statute "rendered Lucas's parcels 'valueless.' " *Lucas,* 505 U.S. at 1007. The Court in *Lucas* considered the question of "whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a [compensable] taking of private property. . . . " *Id.* The *Lucas* decision proceeds on the basis that the South Carolina statute effected a compensable taking of Lucas's property under this Court's "categorical treatment" of a "regulation [that] denies all economically beneficial or productive use of land." *Lucas,* 505 U.S. at 1015.

The instant case could not be further from the categorical total deprivation involved in *Lucas.* The impact of the City's view ordinance on Petitioner's single family

residential property on a coastal hillside is *de minimus*, at most. Petitioner has a valuable residence that is surrounded by a yard that has substantial landscaping unaffected by the City's Ordinance, and that he may further lushly landscape (subject only to the minor limitation that he may not obstruct his neighbor's view with foliage exceeding 16 feet in height). Petitioner is free to enjoy the value of the property as a residence, or sell it for a quite valuable consideration. Thus, *Lucas* does not aid Petitioner's cause, and the California Court of Appeal appropriately so found.

Petitioner in this case goes to great lengths to argue that view preservation is not a common law nuisance or a "background principle" of California property law as discussed by the majority opinion in *Lucas*. Petitioner's efforts miss the point, however, and are unavailing. The *Lucas* majority rejected South Carolina's argument that any valid police power objective of a regulation would serve to immunize the state's "total deprivation" from a Takings Clause challenge. In so doing, the *Lucas* majority did address issues regarding uses accepted as nuisances under state common law and the government's ability to ban such "noxious uses" without paying compensation under the authority of *Mugler v. Kansas*, 123 U.S. 623 (1887) and similar cases. 505 U.S. at 1022. But the *Lucas* Court did so only in the context of the categorical, total deprivation imposed on Mr. Lucas. This Court held that a total proscription of all economically valuable use is not free from an obligation to pay compensation for the categorical taking merely because the goal of the regulation is a valid police power objective. However, the *Lucas* majority opined, a regulation seeking to eliminate a condition

or use traditionally recognized as a nuisance, and therefore constituting an inherent limitation on the owners' title, would not require a payment of just compensation, even if the regulation eliminated the property owner's only economically beneficial use:

> "We believe similar treatment must be accorded ***confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land:*** Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." (emphasis added).

505 U.S. at 1029.

Petitioner misreads *Lucas* as requiring compensation for any restriction, no matter how slight, on a use that is not understood to be a nuisance under the common law of the State. To the contrary, the *Lucas* opinion recognizes the ability to regulate and restrict existing uses without paying compensation, so long as some economically beneficial use is preserved:

> "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; . . . And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless . . . In the case of land, however, we think the notion pressed by the Council that title is somehow

> held subject to the 'implied limitation' that the State may subsequently eliminate ***all economically valuable use*** is inconsistent with the historical compact recorded in the Takings Clause. . . . "

505 U.S. at 1027-1028 (emphasis added).

Thus, this case is not affected by the *Lucas* discussion of historical common law property law and nuisances. The Ordinance in this case obviously is not "confiscatory" within the meaning employed by the *Lucas* court ("regulations that prohibit all economically beneficial use of land"). The Ordinance is within the City's police power, and nothing in the *Lucas* decision or the instant Petition calls that into question. Likewise, nothing in the *Lucas* decision suggests that the use restriction involved in this case requires compensation.

Petitioner seeks to avoid both controlling legal precedent and the unassailable facts that his residential use is not impaired and his property value is undiminished by protesting that he is only seeking compensation for a taking of his trees. That contention is an act of smoke and mirrors that did not fool the California Court of Appeal. The City's regulations do not seek to take Petitioner's trees for some public use or prohibit Petitioner from owning and making use of the trees. The regulations merely prohibit Petitioner from maintaining his trees at their current view-impairing height and location.

The Court of Appeal correctly viewed Petitioner's trees as an incident of his real property ownership. If Petitioner is to be believed, the trees cannot be trimmed or relocated. That could only be true if the trees have

been so affixed to the real property at their present location that they cannot be regarded separately. Moreover, Petitioner's disingenuous claim that he asserts only a taking of his trees, apart from his real property interest, supposes that he could sell his real property interest and retain his ownership of his trees. That patently erroneous supposition opens a trap door beneath Petitioner's claim that the trees must remain at their present height at their present location unless just compensation is paid. In addition, Petitioner's self-deflating argument flies in the face of the language of the *Lucas* majority, quoted above, that states have even broader authority to regulate and restrict use of personal property without implicating the Takings Clause.

Neither Petitioner nor any other property owner is entitled to be free from any restriction on each and every single manner in which he has ever enjoyed the use of his property, and the Takings Clause does not require payment of compensation any time a property use is regulated in a manner that restricts a way in which an owner previously enjoyed his use. The Court of Appeal's Opinion is entirely consistent with the *Lucas* holding.

III.

THE COURT OF APPEAL'S OPINION DOES NOT CONFLICT WITH *EASTERN ENTERPRISES v. APFEL*

Petitioner's contention that the Court of Appeal's decision conflicts with *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) also misses the mark. *Eastern Enterprises* considered a purely economic congressional enactment,

not a local zoning regulation. The Coal Act and its implementation reviewed by this Honorable Court in *Eastern Enterprises* imposed a liability of tens of millions of dollars on Eastern based on Eastern's involvement in the coal mining industry and employment of miners decades ago, even though Eastern had discontinued its coal mining business years before the Coal Act was passed. There is no valid analogy between the retroactive imposition of an enormous financial liability based on Eastern's ancient activities in an enterprise in which Eastern was no longer engaged and the facts of the present case.

Petitioner cavalierly claims that the City's Ordinance applies retroactively like the Coal Act in *Eastern*, but that is simply not true. The Ordinance does not impose an enormous retroactive liability for Petitioner's ancient commercial activities in which he is no longer engaged. The Ordinance merely regulates his *present* and *future* property use. Indeed, unlike the Coal Act in *Eastern Enterprises*, the City's Ordinance does not impose any financial liability on Petitioner. The Ordinance requires Petitioner's neighbor to advance the cost of tree trimming and other costs, as the California Court of Appeal observed.

Likewise, the Ordinance does not retroactively criminalize, penalize or exact financial remuneration for, conduct that occurred years ago. The Ordinance imposes no penalty or liability whatsoever for growing or maintaining foliage at any height prior to adoption of the Ordinance. The Ordinance merely requires Petitioner (and all City property owners) to comply with its restrictions henceforward.

Also unlike the circumstances involved in *Eastern Enterprises*, the City's Ordinance does not impose any obligations of any kind on persons who formerly owned property in the City but who have sold it, regardless of the condition of the foliage on the property before, during or after such prior ownership. The Ordinance regulates only the current use of property by current owners.

Also unlike the Coal Act under review in *Eastern Enterprises*, the City's Ordinance does not compel a Petitioner to transfer money or assets to the ownership and possession of a third party.

Petitioner ignores the huge distinctions between *Eastern Enterprises* and this case. Instead, Petitioner urges that the Court of Appeal was required to engage in a rote application of the *Eastern Enterprises* analysis notwithstanding the prevalence of more germane precedent from this Honorable Court on regulatory takings in the zoning and land use context.

Even so, the Court of Appeal did answer each of the questions that Petitioner now contends remains unanswered – the answers just were not and are not what Petitioner wants to hear. Contrary to Petitioner's contention, the Court of Appeal did answer the question of the economic impact of the City's regulation on Petitioner. The Court of Appeal found that the impact was little or nothing. App. 1, p. 11, 12. The Court of Appeal's conclusion was proper and consistent with the *Lucas* Court's categorical formulation calling for compensation when there is a total deprivation of all economical use "of land" (*see, e.g.*, 505 U.S. at 1015 and 1029). The Court of Appeal's conclusion was also in accord with the *Lucas*

Court's recognition that landowners can reasonably and "necessarily" expect new land use regulations and restrictions on use, even if the precise regulation is not anticipated, and the Court's recognition of an even broader governmental authority to regulate and restrict personal property (505 U.S. at 1027, 1028). The conclusion is not inconsistent with anything in the factually inapposite *Eastern Enterprises* decision.

The Court of Appeal did consider Petitioner's reasonable investment-backed expectations, and concluded that Petitioner had no reasonable expectation of continuing to maintain trees at a particular height in a particular location without restriction for all time. App. 1, p. 12. This, too, was in accordance with the *Lucas* Court's analysis and holding that landowners necessarily expect new regulations, and was not inconsistent with the inapposite *Eastern Enterprises* decision.

The Court of Appeal did consider whether and how far the City's Ordinance reaches into the past to assign liability, and concluded that the Ordinance regulates present and future property use and does not impose liability. App. 1, p. 11, 12. The Court of Appeal did consider the magnitude of the liability imposed, and properly concluded that the liability is virtually nil, since Petitioner's neighbor, not Petitioner, must in the first instance bear the cost of compliance. App. 1, p. 11, 12. The Court of Appeal did consider the nature of the governmental action, and properly concluded that there is nothing so unusual in the City's Ordinance as to render it unconstitutional or subject to payment of compensation. App. 1, p. 8, 10-12.

Unlike the blind-side roundhouse punch the Coal Act threw at Eastern, which had left coal mining years prior to the Coal Act and had reasonably considered itself free of the industry's entanglements, Petitioner here says he has been a City resident and property owner since the City's incorporation. As a property owner, he has had to continually maintain his property and comply with City regulations, many of them newly adopted for the first time upon the City's incorporation. As the *Lucas* opinion teaches, such is to be expected. Petitioner knew his obligations as a resident and property owner were ongoing and subject to change, and could not have ever reasonably expected to be free from any restriction just because it was new.

The extreme facts of *Eastern Enterprises* are so palpably different from the present case as to render Petitioner's reliance on *Eastern Enterprises* unwarranted. Nevertheless, the Court of Appeal Opinion considers the pertinent factors for analysis of this regulatory takings case and reaches appropriate conclusions. This Honorable Court need not entertain Petitioner's suggestion that certiorari should be granted for the purpose of reviewing this rare and insignificant case merely for possible legal error based on inapposite precedent.

IV.

THE COURT OF APPEAL OPINION IS CONSISTENT WITH THE LAW OF NON-CONFORMING USES

Finally, Petitioner makes a weak attempt to portray the Court of Appeal's Opinion as contrary to established legal precedents governing legal non-conforming uses. In

support of this contention, curiously, Petitioner cites only a few lower court decisions of the federal courts (none of which were binding precedent before the California courts). Instead of federal precedent to support his contention that the Opinion below creates a conflict in the authorities, ***Petitioner relies primarily on other published decisions of the California courts.*** In other words, Petitioner would have this Honorable Court sit as the arbiter of what Petitioner imagines are conflicts among the courts of the State of California. Is that not a more appropriate function for the California Supreme Court?

Apart from that fundamental problem, Petitioner's claim that the City's Ordinance is contrary to the weight of established "non-conforming use" precedent is wrong. The non-conforming use cases cited by Petitioner, and all of the cases of which the City is aware, involve changes in zoning regulations that serve to render illegal an existing, legal, primary economically beneficial use of land. *Edmonds v. County of Los Angeles*, 40 Cal.2d 642 (1953) (in rejecting plaintiff's claim of right to expand non-conforming use of property as a trailer court that had been legally established pursuant to government permits, California Supreme Court recognizes that legally established non-conforming commercial use may not be declared illegal, so long as it is not expanded); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors*, 12 Cal.4th 533, 551 (1996) (California Supreme Court applies "diminishing asset" doctrine to a legal-nonconforming quarry, recognizing that a zoning ordinance that is not arbitrary and not unduly restrictive does not violate the Takings Clause "even when the law restricts an existing use of the affected property."); *Browning-Ferris Industries v. City of*

Maryland Heights, 747 F.Supp. 1340 (E.D. Mo. 1990) (change in zoning following city's incorporation that rendered plaintiff's landfill non-conforming where plaintiff had legally operated the landfill pursuant to government permits for years prior to the change in law); *Metromedia, Inc. v City of San Diego*, 26 Cal.3d 848 (1980) (considering reasonableness of amortization period for legal non-conforming commercial billboards); *E.B. Elliott Advertising v. Dade County*, 425 F.2d 1141 (5th Cir. 1970) (considering reasonableness of amortization of commercial billboards); *Outdoor Graphics v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996) (amortization of commercial billboards).

If the government seeks to close or drive out an undesireable business by a change in zoning laws, it must either pay just compensation pursuant to the Takings Clause or provide a reasonable period of time for the business owner to amortize and recoup his investment in the property. Each of the cases cited by Petitioner involves such facts.

No court has held that property owners are constitutionally entitled to amortization of each and every manner in which they might lawfully exercise their primary legal use. The non-conforming use doctrine requires payment of compensation or amortization before a change in zoning can close a previously legal junk yard that becomes non-conforming. The non-conforming use doctrine does not require compensation or amortization for the imposition of restrictions that do not arise to the level of a taking. Amortization is not required to impose limits on the junk yard's hours of operation, noise, or other restraints. Even as to matters of pure aesthetics, the non-

conforming use doctrine would not require just compensation or amortization before a city could impose a limitation on the *height* to which a junk yard could pile its junk, even if the junk yard had legally piled its junk higher for years.

The non-conforming use doctrine has no applicability in this case to the City's minimal restriction on Petitioner's property use, which does not render Petitioner's residence non-conforming and allows Petitioner to continue his valuable primary residential use. Indeed, the *Lucas* Court's recognition of property owners' reasonable expectation that new regulations and restrictions may be imposed without payment of compensation comports with the non-conforming use doctrine and recognizes that the doctrine does not apply in this case. 505 U.S. at 1027-1028. The California Supreme Court's recognition in *Hansen Brothers* that new regulations that are neither arbitrary nor unduly restrictive may be imposed on existing uses without payment of compensation (12 Cal.4th at 551) presents no conflict with non-conforming use doctrine or this Honorable Court's holding in *Lucas*.

Moreover, were this Court to indulge Petitioner's inapplicable non-conforming use argument, the doctrine would require the Court to engage in a detailed and messy scrutiny of historical facts to determine the precise nature of the claimed use, the precise date of commencement of the use, the state of the governing law at that time and the reasonable expectations of landowners at that time. It would further require the Court to study the changes in the governing local law over time, and how such changes might have impacted the property owner's

reasonable expectations. It would further require the Court to sit as trier of fact as to the precise nature, extent and scope of the use at the time the City's Ordinance was adopted in 1989, and determine factually whether the scope of the use (*i.e.*, in this case, the size, height and density of Petitioner's foliage) has been expanded (*i.e.*, whether the foliage has continued to grow) since that time.

There is no need for this Honorable Court to engage in such inquiries, however. The non-conforming use doctrine simply does not apply to the circumstances of this case. No non-conforming use case has imposed the doctrine where the existing use was not being conducted pursuant to an existing governmental permit authorizing that use.

CONCLUSION

This case does not present any issues of such general importance as to warrant a grant of certiorari. The Court of Appeal's Opinion has at most a limited applicability to the few California jurisdictions that protect views. The Petition fails to demonstrate any conflict between the Court of Appeal's Opinion and other precedent, and the Opinion is in fact consistent with controlling precedent

and was correctly decided. The Petition for Certiorari should be denied.

DATED: August 28, 2001

Respectfully submitted,

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APPENDIX 1

California Court of Appeal
Second Appellate District, Division 4

86 Cal.App.4th 472; ___ Cal.Rptr.2d ___ [Jan. 2001]

[No. B138366 Second Dist., Div. Four. Jan. 3, 2001.]

[As modified Jan. 30, 2001.]

JON ECHEVARRIETA, Plaintiff and Appellant, v. CITY OF RANCHO PALOS VERDES et al., Defendants Respondents.

COUNSEL

Sullivan, Workman & Dee and Robert Hampton Rogers for Plaintiff and Appellant.

Carol W. Lynch, City Attorney; Richards, Watson & Gershon, T. Peter Pierce and Gregory M. Kunert for Defendants and Respondents.

OPINION

HASTING, J. – Jon Echevarrieta (appellant) appeals from a judgment entered in favor of respondents the City of Rancho Palos Verdes (the City) and the City of Rancho Palos Verdes City Council (the City Council) after the trial court denied appellant's petition for writ of mandate. At issue is a "view protection" ordinance of the City. We affirm the trial court's judgment.

Factual and Procedural Background

The Ordinance

Voters in the City approved Proposition M on November 7, 1989. It was codified in section 17.02.040 of the Rancho Palos Verdes Municipal Code (hereinafter referred to as the Ordinance), and was most recently amended in January 1997.

In pertinent part, the Ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow in excess of certain height limitations. If foliage in existence already exceeds those height limitations, the person whose view is impaired must first attempt to informally resolve the matter with the person who owns the foliage, and if that fails, may apply for a "view restoration permit." Hearings on the application for the permit are conducted by a view restoration Commission (VRC), a committee of seven members appointed by the City Council. The VRC may grant the permit only if certain specified findings are made. If the VRC orders any foliage trimmed or removed, or replacement foliage is ordered planted, the costs are to be borne by the permit applicant. Any interested party may appeal the VRC's decision to the City Council.

The Application Process

Since 1966, Norbert Keilbach has lived on Greve Drive in the City. His home faces south towards the Pacific Ocean and Catalina Island. Appellant lives on Ganado Drive, on a slope directly below Keilbach's home. Appellant has several trees which are near the border of

his property and Keilbach's, which purportedly block Keilbach's view of the ocean and Catalina Island.[1] Appellant purchased his property in 1964. The trees did not exist prior to the establishment of either Keilbach's or appellant's lots.

In February 1997, Keilbach filed an application with the City in order to compel appellant to trim trees that interfered with his view.

On May 1, 1997, a public hearing was held in connection with the view restoration application. Both appellant and Keilbach appeared. At the conclusion of the hearing, the VRC adopted Resolution No. 97-5, requiring that appellant remove the three pine trees, and to trim the tops of five other trees, at the expense of the applicant, Keilbach.

On May 16, 1997, appellant appealed the VRC's decision to the City Council. The City Council heard the appeal at its public meeting on July 1, 1997, and remanded the matter to the VRC for further consideration of the effect that trimming the trees would have on appellant's privacy.

The VRC held another public hearing on the application on October 2, 1997. At the conclusion of this hearing, the VRC ordered its staff to prepare for adoption at the

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[1] There are 8 trees which are the subject of the dispute: 2 pine trees which measure approximately 40 feet, 1 pine tree which measures approximately 60 feet, 1 pine tree which measures approximately 20 feet, 1 ash tree measuring approximately 40 feet, 1 olive tree which measures 40 to 50 feet, 1 ornamental plum tree which measures 20 feet and 1 scrub oak tree which measures 40 to 50 feet.

next meeting a resolution requiring appellant to trim his trees.

On November 6, 1997, the VRC approved Resolution No. 97-22. This resolution required appellant to trim eight of his trees but also required Keilbach to plant a barrier of no more than 20 to 25 low-growing shrubs between his property and appellant's to mitigate appellant's privacy concerns.

Appellant appealed this decision to the City Council. On March 17, 1998, the City Council heard the appeal during its public meeting.

On April 7, 1998, the City Council adopted Resolution No. 98-21, affirming the VRC's approval of the view restoration permit application and requiring appellant to trim eight of his trees. Appellant then filed this lawsuit in superior court.

Proceedings in Superior Court

Appellant filed his "Petition for writ of mandate; complaint for declaratory relief, taking[,] spot zoning and attorney's fees" on June 17, 1998. In his complaint, he alleged that the City and the City Council abused their discretion in affirming the decision of the VRC to issue the view restoration permit, that the City and the City Council failed to grant him a fair trial, that the affirmance of the approval of the view restoration permit constituted a taking without just compensation in violation of the Fifth Amendment, and that "[b]y its enactment of the view restoration ordinance, the City has actively engaged

in a species of illegal spot zoning," that is, the "unreasonable, arbitrary and discriminatory" classification of property by the enactment of unreasonable and arbitrary regulations pertaining to certain uses or classifications of property. He sought declaratory relief on two grounds: (1) that the ordinance is unconstitutional because it conflicts with state easement law and violates individual property rights and (2) that the view blockage cannot be declared a public nuisance. He also sought an award of attorney fees.

The matter came on for trial on May 4, 1999. Appellant failed to appear and the court ordered the matter dismissed. Appellant's subsequent motion to set aside the dismissal was granted and the matter was reset for trial on August 30, 1999. The matter was ultimately submitted on October 12, 1999, and on November 19, 1999, the trial court denied the petition. It ruled, in pertinent part, "The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law. [¶] In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings that support the City Council's decision. [¶] Uncontradicted evidence in the record show[s] that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated. [¶] [*Kucera v. Lizza* (1997) 59 Cal.App.4th 1141 [69 Cal.Rptr.2d 582]]." Appellant filed a notice of appeal on January 5, 2000.

On March 3, 2000, the City obtained from the superior court a warrant authorizing entry upon appellant's

property "for the sole and exclusive purposes of trimming, culling, and lacing trees and foliage." On March 10, 2000, appellant obtained a 90-day stay of execution upon the warrant. Appellant filed a petition for writ of supersedeas on June 8, 2000. We denied that petition on June 9, 2000.

Discussion

On appeal, appellant makes the following contentions: (1) the trial court erred in relying upon *Kucera v. Lizza, supra,* 59 Cal.App.4th 1141; (2) the ordinance violates the takings clause; (3) retroactive application of the ordinance deprives him of due process; (4) the ordinance is deceptive and uncertain; (5) as applied, the ordinance impermissibly expands the City's police power. We first address issues (1) and (5).

1. *Kucera v. Lizza and the City's Police Power*

In *Kucera v. Lizza, supra,* 59 Cal.App.4th 1141, the Court of Appeal considered the validity of an ordinance of the Town of Tiburon similar to the ordinance presented here. The stated purpose of the Tiburon ordinance was to establish "the right of persons to preserve views or sunlight which existed at any time since they purchased or occupied a property from unreasonable obstruction by the growth of trees" and to establish a process to achieve restoration of views and sunlight. (Tiburon Mun. Code, former §§ 15-1.A & 15-1.B.) In accord with the provisions of the ordinance, the Kuceras petitioned for informal dispute resolution with respect to trees located on the downhill lot across the street, on property owned by

Lizza. The Kuceras claimed the trees obstructed their views of the San Francisco Bay and the Marin County mainland. Lizza refused to participate in the process. The Kuceras filed a complaint in superior court seeking to compel restoration of their views and for abatement of a public nuisance. The trial court entered judgment in favor of Lizza concluding that the ordinance was unconstitutional and void because it was preempted by state law and was an arbitrary and unreasonable exercise of the police power.

The Court of Appeal reversed: " 'It is well settled that the state may legitimately exercise its police powers to advance aesthetic values. . . . "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." ' [Citations.] . . . [¶] . . . [¶] We hold the Tiburon ordinance is directed toward a valid police power goal – to preserve views and sunlight. Tiburon's choice of regulating obstructing trees and tree growth obviously bears a reasonable relationship to the achievement of those goals. [Citation.]" (59 Cal.App.4th at pp. 1148-1149.)

(1) Here, appellant contends that the Ordinance does not state a valid purpose because it states only that "the peace, health, safety and welfare of the community will be served by the adoption of this section." We disagree.

The ballot measure which was approved by the voters states the purposes of the Ordinance as follows: "The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City. The hillsides provide potential vista

points and view lots. The City's General Plan recognizes these natural resources and calls for their protection. The public health, safety and welfare of the City require prevention of needless destruction and impairment of these limited vista points and view lots. . . . [¶] Specifically, this Ordinance: [¶] 1. Protects, enhances and perpetuates views available to property owners and visitors because of the unique topographical features of the Palos Verdes Peninsula. These views provide unique and irreplaceable assets to the City and its neighboring communities. . . . [¶] 2. Defines and protects finite visual resources by establishing limits which construction and plant growth can attain before encroaching onto a view. [¶] 3. Insures that the development of each parcel of land or additions to residences or structures occur in a manner which is harmonious and maintains neighborhood compatibility and the character of contiguous sub-community development as defined in the General Plan." These purposes were reprinted in the View Restoration Permit Guidelines and Procedures issued by the City.

Enacting the Ordinance for these purposes is a [sic] clearly a legitimate exercise of the city's traditional police power. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886 [50 Cal.Rptr.2d 242, 911 P.2d 429]; *Kucera v. Lizza, supra,* 59 Cal.App.4th at p. 1149.) To the extent that the trial court cited *Kucera* for this proposition, it did not err.

2. *The Takings Issue*

We agree that the *Kucera* case is not dispositive of appellant's takings claim. The opinion specifically remanded the matter for further proceedings on this

issue: "The takings authorities cited by the parties are, of course, not directly pertinent. This is a facial challenge and, while it is hard to imagine on this record how compliance with the ordinance and resultant tree trimming might result in an unconstitutional taking, any such argument will have to await a remand and further proceedings." (59 Cal.App.4th at p. 1154.) (**2a**) Here, appellant contends that the ordinance is invalid "as applied," raising the taking issue.

(**3**) The takings clause of the Fifth Amendment to the federal Constitution provides "[N]or shall private property be taken for public use, without just compensation." "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' [(*Armstrong v. United States* [(1960)] 364 U.S. 40, 49 [80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554]).]" (*Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 522 [118 S.Ct. 2131, 2146, 141 L.Ed.2d 451].) Similarly, the California Constitution at article I, section 19, provides that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has first been paid. . . . "

(**4**) A party challenging a governmental action as an unconstitutional taking bears a substantial burden. (*Eastern Enterprises v. Apfel, supra,* 524 U.S. at p. 523 [118 S.Ct. at pp. 2146-2147].) Not every destruction or injury to property by the government has been held to be a taking. (*Armstrong v. United States, supra,* 364 U.S. at p. 48 [80 S.Ct. at pp. 1568-1569].) The process for evaluating the constitutionality of a governmental action involves an examination of its "justice and fairness," for which there

is no set formula, and the inquiry is "essentially ad hoc and fact intensive." (*Eastern Enterprises, supra,* at p. 523 [118 S.Ct. at p. 2146].) Several factors which have been held to be particularly significant are: (1) the economic impact of the regulation; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. (*Eastern Enterprises, supra,* at pp. 523-524 [118 S.Ct. at p. 2146].)

There are two types of regulatory action which have been adjudicated to be "per se" takings without the necessity of weighing the public interest advanced in support of the restraint. Those are: (1) where the property owner has suffered a physical invasion of his property and (2) where the regulation denies all economically beneficial or productive use of land. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [112 S.Ct. 2886, 2893, 120 L.Ed.2d 798].)

(**2b**) Contrary to appellant's arguments, the Ordinance does not itself compel a physical invasion of appellant's property. Rather, it is appellant's refusal to comply with Resolution No. 98-21, after ample notice and opportunity to correct, that has occasioned the threat of the City's entry onto the property. It does not therefore, rise to the level of a physical invasion. (*Yee v. Escondido* (1992) 503 U.S. 519, 527 [112 S.Ct. 1522, 1528, 118 L.Ed.2d 153]; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7, 12 [32 Cal.Rptr.2d 244, 876 P.2d 1043]; *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1358 [247 Cal.Rptr. 715].)

Likewise, we find unavailing appellant's attempt to analogize this case to *Lucas v. South Carolina Coastal Council, supra,* 505 U.S. 1003 as a denial of his "reasonable

investment backed expectations." In *Lucas*, the purchaser of two lots zoned for residential use was later precluded by state legislation from erecting *any* permanent habitable structures on the lots. Unlike the plaintiff in *Lucas*, appellant here is not deprived of any significant economically beneficial use of his land.

Here, while the City has imposed limitations on the height of preexisting foliage, it is a legitimate exercise of police power which does not rise to the level of a taking. Contrary to "per se" takings, "traditional land-use regulations" such as the imposition of minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions "have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. [Citations.]" (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 886; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518 [125 Cal.Rptr. 365, 542 P.2d 237] ["[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging . . . "].) "The denial of the highest and best use does not constitute an unconstitutional taking of property. [Citation.] 'Even where there is a very substantial diminution in the value of land, there is no taking. . . . ' (*Long Beach Equities, Inc. [v. County of Ventura* (1991)] 231 Cal.App.3d [1016,] 1036 [282 Cal.Rptr. 877].)" (*Ramona Convent of the Holy Names v. City of Alhambra* (1993) 21 Cal.App.4th 10, 23 [26 Cal.Rptr.2d 140].)

It is even questionable whether there has been a diminution in the value of the land. Appellant cites the damage to his property as his loss of privacy and "utility saving cooling shade."

Appellant cannot show he has a vested right to foliage of a certain height or to a fixed amount of utility charges. In addition, appellant has not been ordered to destroy his trees, but simply to trim them. The City's resolution provides that the cost of the tree removal is to be borne by Keilbach and that reasonable replacement shrubbery is also to be purchased by him. If any of the trees or shrubs that is ordered trimmed dies within one year, Keilbach is to bear the expense of a replacement tree or shrub.

While appellant cherishes his park-like privacy, the regulation of tree heights throughout the city may indirectly increase the property's value, as the city becomes known for one which has scenic vistas. (See *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d at pp. 520-521.) As for the loss of his privacy, the VRC made a specific finding, after visiting Keilbach's property, that there was no unreasonable infringement of appellant's privacy "since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property."

Accordingly, we find no taking as contemplated within the Fifth Amendment of the United States Constitution or article I, section 19 of the California Constitution.

3. *Due Process Claims*

a. *Retroactive Application*

(5) Appellant contends that retroactive application of the Ordinance amounts to irrational and arbitrary action. He also argues that the Ordinance allows view seekers to exact retribution against foliage owners and that the VRC did not appropriately balance the interests of the two property owners. In support of these arguments, he cites *Eastern Enterprises v. Apfel, supra,* 524 U.S. 498.

In *Eastern,* a company that formerly was in the coal mining business left that industry. Several years later, the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) was enacted, providing for assigned benefits to retirees in the coal industry. The effect of this act was to impose $50 million to $100 million worth of liability on the company based on its activities 30 to 50 years earlier. (524 U.S. at pp. 503, 516-517 [118 S.Ct. at pp. 2137, 2143].)

The company sued, claiming there was a taking and a violation of due process rights. (524 U.S. at pp. 517, 529 [118 S.Ct. at pp. 2143, 2149].) In concluding that the company's claims had merit, the Supreme Court noted that retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. (*Eastern Enterprises v. Apfel, supra,* at pp. 532, 533 [118 S.Ct. at p. 2151].) The court concluded that the length of time that the Coal Act reached back to impose liability on the company and the magnitude of the liability raised substantial fairness question.

Here, there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height. (See discussion, *infra,* on vagueness claim.)

In addition, there is no showing that the ordinance was applied in an arbitrary or irrational manner. (*United States v. Carlton* (1994) 512 U.S. 26, 32 [114 S.Ct. 2018, 2022-2023, 129 L.Ed.2d 22].) The ordinance requires first resort to informal dispute resolution and provides for noticed hearings and rights of appeal. Keilbach and the City Council duly followed all the required steps. There is no factual basis for appellant's contention that the City or the VRC acted with an improper motive. In fact there is no reason given by appellant for Keilbach's actions against appellant other than view restoration.

b. *Uncertainty*

(6) Appellant contends that the ordinance is so unclear that it violates due process. He cites *Ross v. City of Rolling Hills Estates* (1987) 192 Cal.App.3d 370, 375 [238 Cal.Rptr. 561], for the tests for vagueness challenge as follows: (1) the statute must not forbid nor require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the language must be definite enough to provide a standard of conduct as well as a standard by which adjudicating agencies can ascertain compliance; (3) the words used should be well

known enough to enable affected persons to understand and correctly apply them; they must be either of long-standing usage in the profession or industry involved or those which have be interpreted by the courts, or those which the meaning of which may be determined by knowledge and experience, or those which may be made reasonably certain by reference to common law or legislative history. (*Id.* at p. 375.)

The *Ross* case itself notes, " '[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies. [Citations.]" (192 Cal.App.3d at p. 376, citing *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439].)

The Ordinance provides at section (B)(3): "3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding: [¶] a. The height determined by the view restoration commission through issuance of a view restoration permit under Section 17.02.040 (C)(2) of this chapter; or [¶] b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of: [¶] i. The ridge line of the primary structure on the property; or [¶] ii. Sixteen feet. [¶] If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of Section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on November 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing

on the effective date of this section (November 17, 1989). *The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view."*[2] (Italics added.)

Appellant contends that the final paragraph of this section is so deceptive and uncertain as to violate due process principles, as demonstrated by the minutes of the City Council meeting held on July 1, 1997. In particular, appellant argues that it is unclear whether paragraph 3.b. applies when no VRC determination has been made or to all foliage in existence at the time of enactment.

Section (B)(3) can be fairly read without resort to other materials as follows: If a property owner had trees exceeding 16 feet prior to November 17, 1989, impairing the view of a neighbor, the property owner is prohibited from letting that foliage grow any higher whether or not the neighbor has obtained a view restoration permit. The final sentence means that if the neighbor does eventually seek a permit, the trees in excess of 16 feet can be ordered to be trimmed. We do not find this section to be either deceptive, unclear or uncertain.

Appellant also contends that section (C)(2)(f) of the Ordinance, which permits the VRC to recommend

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[2] The last two sentences were not contained in the original Proposition M. The first of these sentences was added when Proposition M was codified, the last one added when the ordinance was amended in 1997.

removal and replacement of trees is vague and confusing because there is no language indicating the consequences that befall a nonconsenting foliage owner. That section provides: "The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse impact on: (a) the public health, safety, and welfare, (b) the privacy of the property owner, . . . provided that the property owner consents to the replacement."

We find no vagueness in this section either. The VRC is empowered to impose whatever reasonable conditions or restrictions as are appropriate or necessary "as may be found to be appropriate or necessary to protect the public health, safety, or welfare" in the event that a property owner does not consent to removal or replacement. There is nothing unconstitutional about this delegation of broad discretionary power to the VRC and the City. (*Ross v. City of Rolling Hill Estates, supra,* 192 Cal.App.3d at p. 376.)

DISPOSITION

The judgment of the superior court is affirmed.

Vogel (C. S.), P. J., and Epstein, J., concurred.

APPENDIX 2

RESOLUTION NO. 98-21

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES AFFIRMING THE APPROVAL OF VIEW RESTORATION PERMIT NO. 29 TO TOP, TRIM, AND/OR REMOVE TREES AT 30327 GANADO DRIVE.

WHEREAS, on February 18, 1997, Mr. and Mrs. Norbert Keilbach, who own property located at 3632 Greve Drive, in the City of Rancho Palos Verdes, filed an application for View Restoration Permit No. 29 ("Permit") to top, trim and/or remove several trees on the property located at 30327 Ganado Drive. ("the subject property"), owned by Mr. Jon Echevarrieta ("the foliage owner"); and

WHEREAS, pursuant to the requirements of the Municipal Code, notice of the hearing before the View Restoration Commission ("Commission"), along with copies of the Staff report, were mailed to the applicant and the foliage owner on April 1, 1997, 30 days in advance of the hearing; and

WHEREAS, on May 1, 1997, after all voting members of the View Restoration Commission had visited the site, the Commission held a duly noticed public hearing, to consider the request, at which time, all interested parties were given an opportunity to be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit No. 29 by adopting V.R.C. Resolution No. 97-5; and

WHEREAS, on May 16, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on July 1, 1997, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

WHEREAS, after hearing all public testimony, and discussing the issues, the City Council remanded VRP No. 29 back to the View Restoration Commission: and

WHEREAS, on October 2, 1997, after all voting members of the View Restoration Commission had revisited the site, the Commission held a duly noticed public hearing to consider the request, at which time, all interested parties were given an opportunity to be heard and present evidence, the View Restoration Commission made all necessary findings, and approved View Restoration Permit No. 29; and

WHEREAS, on November 6, 1997, the View Restoration Commission adopted V.R.C. Resolution No. 97-21 as amended in the attached conditions outlined in Exhibit A; and

WHEREAS, on November 21, 1997, within the fifteen day appeal period, Mr. Jon Echevarrieta, the foliage owner, appealed the Commission's decision to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Municipal Code, the City Council held a public hearing on March 17, 1998, at which time all interested parties were given an opportunity to be heard and present evidence on the notice of appeal; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The applicant at 3632 Greve Drive has a view, as defined by Section 17.02.040 of the City's Development Code, which includes the Pacific Ocean and Catalina Island.

Section 2: The applicant's viewing area, as defined by Section 17.02.040 of the City's Development Code, includes: living room, dining room, and an outdoor patio area at the rear of the property at 3632 Greve Drive because these areas all share the same view of the ocean and Catalina Island.

Section 3: The subject property at 30327 Ganado Drive contains four (4) large Pine trees, one (1) Ash tree, one (1) Ornamental Plum tree, one (1) Olive tree, one (1) Scrub Oak tree, that significantly impair the applicant's view.

Section 4: The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on their part to resolve conflicts, as evidenced by the letter dated February 13, 1997 and receipt for registered mail sent to the foliage owner at 30327 Ganado Drive.

Section 5: Based on evidence provided by the applicant, the subject trees at 30327 Ganado Drive significantly impair a substantial portion of the applicant's primary view. Two (2) Pine trees measure approximately 35 to 40 feet, one (1) Pine tree measures approximately 60 feet,

one (1) Pine tree measures 18-20 feet, the Ash tree measures approximately 35-40 feet, the Olive tree measures roughly 40-50 feet, the Ornamental Plum tree measures 20 feet, and the Scrub Oak tree measures roughly 40 to 50 feet tall. All trees exceed the ridge line of the primary structure of the foliage owners's property, which is approximately 26 feet in height as measured from the existing building pad grade. The ridgeline of the primary structure is located at a higher elevation than the 16 foot elevation measured from the existing base of each tree.

Section 6: The subject property is located less than one thousand (1,000) feet from the applicants property.

Section 7: The applicant's and foliage owner's properties were created in 1963. There is a solis [sic] report in the file demonstrating that the area was covered with brush and that the subject trees did not exist prior to the establishment of the lots.

Section 8: The recommended topping, trimming, and/or removal of the subject trees will not cause an increased or unreasonable infringement on the privacy of the foliage owner since the subject trees limit but do not totally eliminate all viewing into the foliage owner's property from the applicant's property. Further, replacement shrubs are required to be planted at the applicant expense to allow for additional screening.

Section 9: The foliage owner questioned the legality of the applicant's second story deck. Staff researched the issue and found that the Planning Department had approved the Site Plan Review for the deck, however, the building plan check for the project had expired. Prior to the start of the second VRC review, the applicant resolved

the matter with the City's Building and Safety Department and final building permit was issued.

Section 10: Based on the field review of the City's Geotechnical Consultant, the recommended removal of the subject Pine trees, without replacement of such foliage, could increase slope erosion. As a result, the City's Geotechnical Consultant has advised that: the Pine tree stumps and the root systems should remain intact and replacement shrubs shall be planted, as identified in Condition No. 2 of attached Exhibit "A", to further support the slope.

Section 11: The topping, trimming, and/or removal of the subject trees as identified in Conditions 1 through 7 of attached Exhibit "A", is necessary in order to restore the applicant's view.

Section 12: Pursuant to Section 15300 of the California Environmental Quality Act the proposed project is categorically exempt under Class 4 of that section because the work required to restore the applicants view does not include the removal of scenic and mature trees as identified by the City of Rancho Palos Verdes General Plan (Visual Aspects; Figure 41).

Section 13: The time within which the judicial review of the decision reflected in this Resolution, if available, must be sought is governed by Section 1094.6 of the California Code of Civil Procedure.

Section 14: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, which are attached hereto by reference, the City Council of the City

of Rancho Palos Verdes hereby denies the appeal, thereby upholding the View Restoration Commission's decision with modifications to the conditions of approval attached as Exhibit A, and approves View Restoration Permit No 29 to top, trim, and/or remove trees at 30327 Ganado Drive in order to restore the view from 3632 Greve Drive, as requested and provided for in the conditions outlined in the attached Exhibit "A" and the attached plot plan diagram.

PASSED, APPROVED, AND ADOPTED on the 7th day of April 1998.

/s/ Barbara J. Ferraro
Mayor

ATTEST:

/s/ JO PURCELL
City Clerk

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss
CITY OF RANCHO PALOS VERDES)

I, Jo Purcell, City Clerk for the City of Rancho Palos Verdes, hereby certify that the above Resolution No. 98-21 was duly and regularly passed and adopted by the said City Council at a regular meeting held on April 7, 1998.

City Clerk

EXHIBIT "A"
CONDITIONS OF APPROVAL
VIEW RESTORATION PERMIT NO. 29

1. Pine Trees No. 1, 2, & 3: Remove Pine trees No. 1, No. 2, and No. 3, with the consent of the foliage owner. However, if the foliage owner does not grant the authority to remove the trees, then the crowns of all three trees shall be topped to the level of the applicants pad and maintained in such a manner. Additionally, the applicant shall pay for the planting of a mid-slope privacy barrier. The barrier shall consist of a variety of plants (not more than 20 to 25 plants), to be selected by the foliage owner from a list provided by Staff. Final selection and placement of the plant materials shall be made by the foliage owner, reviewed by the City Arborist, and approved by the Director of Planning, Building, and Code Enforcement. The City Arborist shall provide the foliage owner with all the information that will assist the foliage owner in selecting the appropriate plantings, including but limited to, the distance of the plantings from the top of the slope, the natural mature height of the selected foliage and the anticipated frequency and costs of maintenance of the foliage.

2. To prevent increased slope erosion, the stumps and the root systems of Pine trees No. 1, 2, and 3 should remain intact and the area shall be replanted with Acacia Redolens, or a similar plant species approved by the Director of Planning, Building and Safety, and Code Enforcement. Any newly planted foliage shall be maintained at a height that will not impair a view from another property in the future.

3. Pine Tree No. 4: Pine tree No. 4 shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the

ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

4. Ash Tree: The ash tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

5. Olive Tree: The Olive tree shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

6. Ornamental Plum Trees: The Ornamental Plum shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

7. Scrub Oak Tres [sic]: The Scrub Oak shall be topped and trimmed from a point which does not exceed a diagonal line drawn from a point at the top of the transitional slope at 3632 Greve Drive, and extending to the ridgeline of the residence at 30327 Ganado Drive, and maintained in such a manner.

8. Pursuant to Section V-A-4 of the VRP Guidelines and Procedures, any tree or shrub that is removed shall be cut flush to the ground leaving the root systems and stumps in place.

9. If any tree or shrub that is ordered to be culled, laced, or trimmed as specified in this permit, dies within one year of the initial work being performed due to the performance of the work, the applicant or any subsequent owner of the applicant's property shall be

responsible for providing a replacement tree or shrub to the foliage owner. The replacement foliage shall be provided in accordance with the specifications described in Section V-E of the VRP Guidelines and Procedures.

10. No sooner than one year after the initial trimming is completed, City Staff shall report to the Commission as to the adequacy of the maintenance schedule, as well as the foliage owner's ability to maintain the foliage in compliance with these conditions of approval. The Commission shall consider the Staff report and determine if a public hearing to amend the conditions is necessary. If the Commission determines that a hearing is necessary, then a hearing will be held pursuant to Section V.I. of the VRP Guidelines and Procedures.

11. The applicants should, not later than 30 days after approval of this permit, present to the City, at least one itemized estimate to carry out the aforementioned work. Such estimate is to be supplied by a licensed landscape or licensed tree service contractor, acceptable to the City, which provides insurance certificates in a form acceptable to the City, and shall include all costs of cleanup and removal of debris. In addition, the applicant shall pay to the City an amount equal to the City selected estimate and such funds shall be maintained in a City trust account until completion of work.

12. The foliage owners shall select a contractor from the estimates provided by the applicants or another licensed firm of their choice subject to approval by the City, to perform the required work. However, the foliage owner shall only be reimbursed for the amount of the lowest bid submitted by the applicant. If the foliage owner chooses to do the required work

himself, then the foliage owner shall not be compensated from the trust account and the amount in the trust account shall be refunded to the applicant.

13. The applicant may reduce the scope of the trimming required by this Permit by giving the City and the foliage owner written notice of such decision within 30 days of this approval. The applicant shall deposit funds to the City in a trust account in an amount sufficient to cover the remaining work. However, trimming or removal of the vegetation which the applicants have chosen to eliminate would then require an entirely new View Restoration application and fee.

14. The applicant may withdraw his view restoration request and his trust account funds if the applicant does so within five (5) days after the applicant has sent the estimate required herein. In the event that the applicant withdraws his/her request in a timely manner, the foliage owner is not required to perform the work specified by this Permit and this Permit is of no further force and effect.

15. The foliage owner shall, no later than 90 days after the Notice of Approval (First Notice) is mailed, complete the work to the extent required by this Permit, and shall maintain the vegetation to a height that will not impair a view from another property in the future as specified in these Conditions of Approval.

16. The City shall reimburse the foliage owner from the City's trust account, not later than 30 days after receipt of the appropriate billing and the satisfactory completion of the required work specified by this Permit, as verified by City Staff, in an amount not to exceed the amount of the applicant's trust account.

17. If the required work as specified herein is not completed within the stipulated time periods, then the

City of Rancho Palos Verdes will authorize a bonded tree service to perform the foliage removal work at the subject property at the foliage owner's expense. In the event that the City is required to perform the work at the foliage owner's expense, the City shall reimburse the applicant from the City trust account not later than 30 days after the City completes the work.

18. Subsequent to the trimming or removal of the foliage, Staff will document the restored view for future reference by submitting to the applicant, foliage owner, and Director of Planning, Building and Code Enforcement, photographs of the restored view taken from the applicant's viewing area along with a "Documentation of Existing Foliage or View."

APPENDIX 3

ORDINANCE NO. 319

AN ORDINANCE OF THE CITY OF RANCHO PALOS VERDES ADOPTING AMENDMENTS TO SECTION 17.02.040 OF THE CITY OF RANCHO PALOS VERDES MUNICIPAL CODE

WHEREAS, on June 9, 1994, the Planning Commission and View Restoration Commission conducted a joint Sub-Committee workshop to discuss potential amendments to Section 17.02.040 (Proposition M) of the City's Municipal Code; and

WHEREAS, on June 30, 1994, the City Council and View Restoration Commission conducted a joint workshop to discuss potential amendments to Section 17.02.040 (Proposition M) of the City's Municipal Code; and

WHEREAS, on January 21, 1995, the City Council, Planning Commission and View Restoration Commission conducted a joint workshop to discuss potential amendments to Section 17.02.040 (Proposition M) of the City's Municipal Code; and

WHEREAS, after notice pursuant to the provisions of the Rancho Palos Verdes Municipal Code, Planning Commission public hearings were held on March 23, 1994, May 24, 1994, November 9, 1994, December 13, 1994, January 24, 1995 and October 10, 1995, to consider amendments to Section 17.02.040, at which time all interested parties were given an opportunity to be heard and present evidence regarding said amendments; and

WHEREAS, the Planning Commission adopted P.C. Resolution No. 95-45 on November 14, 1995 recommending to the City Council certain amendments to Section 17.02.040; and

WHEREAS, View Restoration Commission public hearings were held on October 27, 1994, November 17, 1994, December 1, 1994, and April 20, 1995, to consider amendments to Section 17.02.040, at which time all interested parties were given an opportunity to be heard and present evidence regarding said amendments; and

WHEREAS, the View Restoration Commission adopted V.R.C. Resolution No. 95-02 on May 4, 1995 recommending to the City Council certain amendments to Section 17.02.040; and

WHEREAS, after notice pursuant to the provisions of the Rancho Palos Verdes Municipal Code, City Council public hearings were held on February 20, 1996, March 11, 1996, May 21, 1996 and July 2, 1996, at which time all interested parties were given an opportunity to be heard and present evidence regarding said amendments; and

WHEREAS, as a result of the City Council public hearings, the City Council directed Staff to prepare further amendments to Section 17.02.040; and

WHEREAS, the amendments were reviewed and approved by the Planning Commission on August 19, 1996 and by the View Restoration Commission on August 15, 1996, and forwarded to the City Council for its final review and consideration on August 20, 1996, September 17, 1996 and December 17, 1996.

NOW THEREFORE THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DOES HEREBY FIND, DETERMINE, AND ORDAIN AS FOLLOWS:

Section 1: The City Council has reviewed and considered the amendments to Section 17.02.040 of the Municipal Code.

Section 2: The City Council finds that the amendments to Section 17.02.040 are consistent with California Government Code Section 65853, zoning amendment procedures.

Section 3: The City Council finds that the amendments to Section 17.02.040 are consistent with the Rancho Palos Verdes General Plan and Coastal Specific Plan in that they uphold, and do not hinder, the goals and policies of those plans, in particular to carefully control and direct future growth towards making a positive contribution to all elements of the community.

Section 4: The City Council finds that the amendments to Section 17.02.040 are consistent with the purposes and intent of Proposition M in that the amendments to the Proposition M language merely relocate, reorganize or clarify the Proposition M text.

Section 5: The City Council finds that the amendments to Section 17.02.040 are substantially the same as previous provisions of the Rancho Palos Verdes Municipal Code or any other ordinance repealed, amended or superseded upon the enactment of this ordinance and that the amendments to Section 17.02.040 be construed as a restatement and continuation of these previous provisions and not as new enactments.

Section 6: The City Council further finds that the amendments to Section 17.020.040 do not have the potential to create a significant effect on the environment and therefore are determined to be categorically exempt (Class 8) from the California Environmental Quality Act (CEQA).

Section 7: The City Council further finds that the amendments to Section 17.02.040 are necessary to preserve the public health, safety, and general welfare in the area.

Section 8: For the foregoing reasons and based on the information and findings included in the staff reports and records of the proceedings, Section 17.02.040 of Chapter 17.02 of Title 17 of the City of Rancho Palos Verdes Municipal Code is hereby amended to read as follows:

17.02.040 View preservation and restoration. The residents of the city of rancho palos verdes by the adoption of this section, have made a finding that the peace, health, safety and welfare of the community will be served by the adoption of this section and by the regulations prescribed herein.

A. Definitions. When not inconsistent with the context, the words used in the present tense include the future; words in the singular number include the plural; and those in the plural number include the singular. In carrying out the intent of this section, words, phrases and terms shall be deemed to have the following meanings ascribed to them:

1. "City" means the city of rancho palos verdes and its employees and staff and those designated by the city council to act on behalf of the city.

2. "City council" means the duly elected legislative body of the city of rancho palos verdes.

3. "Director" means the director of the planning, building and code enforcement department of the city of rancho palos verdes.

4. "Foliage" means natural growth of trees, shrubs and other plant life.

5. "Lot coverage" means that portion of a lot or building site which is occupied by any building or structure, including trellises; decks over thirty (30) inches in height, as measured from existing adjacent grade; parking areas; or driveways.

6. "Neighborhood character" means the existing characteristics in terms of the following:

a. Scale of surrounding residences;

b. Architectural styles and materials; and

c. Front yard setbacks.

7. "Planning Commission" means the planning commission of the city of rancho palos verdes as defined in chapter 2.20 (Planning Commission) of this municipal code.

8. "Privacy" means reasonable protection from intrusive visual observation.

9. "Scale" means the total square footage and lot coverage of a residence and all ancillary structures.

10. "Setback" means the minimum horizontal distance as prescribed by this code, between any property line or private easement boundary used for vehicular and/or pedestrian access and the closest point on any building or structure, below or above ground level, on the property. In cases where there is no structure on a lot, setback shall mean the minimum horizontal distance between the property line or easement boundary line and a line parallel to the property line or easement boundary line. Please refer to chapter 17.48 (Lots, Setbacks, Open Space Area and Building Height) for setback regulations.

11. Shall and May. "Shall" is mandatory and "may" is permissive.

12. "Structure" means anything constructed or built, any edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner, which is located on or on top of the ground on a parcel of land utilized for residential purposes, excluding antennas, skylights, solar panels, and similar structures not involving the construction of habitable area.

13. "Style" means design elements which consist of, but are not limited to:

a. Facade treatment;

b. Height of structure;

c. Open space between structures;

d. Roof design;

e. The apparent bulk or mass of the structure; and

f. The number of stories.

14. View. On the palos verdes peninsula, it is quite common to have a near view and a far view because of the nature of many of the hills on the peninsula. Therefore, a "view" which is protected by this section is as follows:

a. A "near view" which is defined as a scene located on the peninsula including, but not limited to, a valley, ravine, equestrian trail, pastoral environment or any natural setting; and/or

b. A "far view" which is defined as a scene located off the peninsula including, but not limited to, the ocean, los angeles basin, city lights at night, harbor, vincent thomas bridge, shoreline, or offshore islands.

A "View" which is protected by this section shall not include vacant land that is developable under the city code, distant mountain area not normally visible, nor the sky, either above distant mountain areas or above the height of offshore islands. A view may extend in any horizontal direction (three hundred sixty degrees of horizontal arc) and shall be considered as a single view, even if broken into segments by foliage, structures or other interference.

15. "Viewing area" means that area of a structure (excluding bathrooms, hallways, garages, or closets) or that area of a lot (excluding the setback areas) where the owner and city determine the best and most

important view exists. In structures, the finished floor elevation of any viewing area must be at or above existing grade adjacent to the exterior wall of the part of the building nearest to said viewing area.

16. The "view restoration commission" means a planning commission for limited purpose, as defined by chapter 2.21 (View Restoration Commission) of this municipal code, appointed by the city council to consider applications for view restoration permits and city tree review permits. The terms and qualifications of office shall be established by the city council. The commission shall consist of seven members and three alternates, representing as diverse a geographical mix of members and alternates as is practical. The view restoration commission shall draft regulations and policies to guide the actions of the commission, which shall be binding after approval by the city council. In the event the workload of the view restoration commission declines to an amount deemed by the city council to make the continuation of the view restoration commission impractical, the city council shall disband the view restoration commission and transfer its work to the planning commission created and established by chapter 2.20 (Planning Commission) of this municipal code. When the term "planning commission" is referred to in this code, it shall mean the "planning commission of the city of rancho palos verdes" as defined in chapter 2.20 (Planning Commission), and shall not mean the "view restoration commission" as defined in this section.

B. Regulations.

1. Building Height. Any individual or persons desiring to build a structure or an addition to an existing structure exceeding sixteen (16) feet in height, may apply for a height variation permit, which, if granted pursuant to the procedures contained herein, will permit the individual to build a structure not exceeding twenty-six (26) feet in height, except as provided in section 17.02.040(B)(1)(d) of this chapter; or such lower height as approved by the city, measured as follows:

a. for sloping lots which slope uphill from the street of access or in the same direction as the street of access and for which no building pad exists, the height shall be measured from the preconstruction (existing) grade at the highest point on the lot to be covered by the structure to the ridgeline or the highest point of the structure, as illustrated in figure 1 below.

[Figure 1 omitted in printing]

b. For sloping lots which slope downhill from the street of access and for which no building pad exists, the height shall be measured from the average elevation of the setback line abutting the street of access to the ridge line or the highest point of the structure, as illustrated in figure 2 below.

[Figure 2 omitted in printing]

c. For lots with a "building pad" at street level or at a different level than the street or lot configurations not previously discussed, the height shall be measured from the preconstruction (existing) grade at the highest elevation of the existing building pad area

covered by the structure to the ridge line or highest point of the structure, as illustrated in figure 3 below. Portions of a structure which extend beyond the "building pad" area of a lot shall not qualify as the highest elevation covered by the structure, for the purposes of determining maximum building height. Structures allowed pursuant to this subsection shall contain no more than one (1) story (cellars and basements are exempted from this requirement) and shall not exceed twenty (20) feet in height, as measured from the point where the lowest foundation or slab meets finished grade, to the ridgeline or highest point of the structure. Otherwise, a height variation permit shall be required.

[Figure 3 omitted in printing]

d. On sloping lots described in sections 17.02.040(B)(1)(a) and 17.02.040(B)(1)(b) of this chapter, the foundation of the structure shall contain a minimum eight (8) foot step with the slope of the lot, as illustrated in Figure 4 below. However, no portion of the structure shall exceed thirty (30) feet in height, when measured from the point where the lowest foundation or slab meets finished grade to the ridge line or highest point of the structure. The thirty (30) foot height shall not exceed a horizontally projected sixteen (16) foot heightline (from the high point of the uphill step of the structure).

2. Setbacks for Sloping Lots. On lots which slope uphill from the street of access and where the height of a structure is in excess of sixteen (16) feet above the point where the lowest foundation or slab meets the ground, areas in excess of the sixteen (16) foot height limit shall be set back one (1) foot from the exterior

building facade of the first story, most parallel and closest to the front property line, for every foot of height in excess of sixteen (16) feet, as measured from the point where the lowest foundation or slab meets the ground, as illustrated in Figure 4 below.

[Figure 4 omitted in printing]

3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding:

a. The height determined by the view restoration commission through issuance of a view restoration permit under section 17.02.040(C)(2) of this chapter, or,

b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of:

(i) the ridge line of the primary structure on the property, or

(ii) sixteen (16) feet.

If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on november 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing on the effective date of this section (november 17, 1989). The purpose of this paragraph is to

ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not "grandfather" or otherwise permit such foliage to continue to block a view.

4. Removal of Foliage as Condition of Permit Issuance. The city shall issue no conditional use permit, variance, height variation, building permit or other entitlement to construct a structure, or to add livable area to a structure on a parcel utilized for residential purposes, unless the owner removes that part of the foliage on the lot exceeding sixteen (16) feet in height or the ridge line of the primary structure, whichever is lower, that significantly impairs a view from the viewing area of another parcel. The owner of the property is responsible for maintaining the foliage so that the views remain unimpaired. This requirement shall not apply where removal of the foliage would constitute an unreasonable invasion of the privacy of the occupants of the property on which the foliage exists and there is no method by which the property owner can create such privacy through some other means allowed within the development code that does not significantly impair a view from a viewing area of another property. The initial decision on the amount of foliage removal required or the reasonable degree of privacy to be maintained shall be made by the director, the planning commission or the city council, as appropriate for the entitlement in question. If the permit issuance involves property located within the miraleste recreation & park district, the findings of section 17.02.040(C)(2)(c)(vi) of this chapter shall apply. A decision by the director on either of these matters may be

appealed to the planning commission, and any decision of the planning commission may be appealed to the city council.

5. Determination of viewing area.

a. The determination of a viewing area shall be made by balancing the nature of the view to be protected and the importance of the area of the structure or lot from where the view is taken. Once finally determined for a particular application, the viewing area may not be changed for any subsequent application. In the event the city and owner cannot agree on the viewing area, the decision of the city shall control. A property owner may appeal the city's determination of viewing area. In such event, the decision on the viewing area will be made by the body making the final decision on the application. A property owner may preserve his or her right to dispute the decision on the viewing area for a subsequent application, without disputing the decision on a pending application, by filing a statement to that effect and indicating the viewing area the property owner believes to be more appropriate. The statement shall be filed with the city prior to consideration of the pending application by the city.

C. Procedures and Requirements.

1. Preservation of views where structures are involved.

a. Any person proposing to construct a structure above sixteen (16) feet shall submit a height variation permit application to the city. A determination

on the application shall be made by the director in accordance with the findings described in section 17.02.040(C)(1)(e) of this chapter. The director shall refer a height variation application directly to the planning commission for consideration under the same findings, as part of a public hearing, if any of the following is proposed:

i. Any portion of a structure which exceeds sixteen (16) feet in height extends closer than twenty-five (25) feet from the front or street-side property line; or

ii. The area of the structure which exceeds sixteen (16) feet in height (the second story footprint) exceeds seventy-five percent (75%) of the existing first story footprint area (residence and attached garage);

iii. Sixty percent (60%) or more of an existing garage footprint is covered by a structure which exceeds sixteen (16) feet in height (a second story); or

iv. Based on an initial site visit, the director determines that any portion of a structure which is proposed to exceed sixteen (16) feet in height may significantly impair a view as defined in this chapter.

b. The applicant shall take reasonable steps established by the city council to consult with owners of property located within five hundred (500) feet of the applicant's property. The applicant shall obtain and submit with the application, the signatures of the persons with whom the applicant consulted. Where a homeowners' association existing in the neighborhood affected

has provided written notice to the director of its desire to be notified of height variation applications, the applicant shall mail a letter to the association requesting its position on the application. A copy of this letter and the response of the association, if any, shall be submitted with the application. A fee shall be charged for the application as established by resolution of the city council.

c. the director shall, by written notice, notify property owners within a five hundred (500) foot radius of the subject property and the affected homeowners' association, if any, of the application and inform them that any objections to the proposed construction must be submitted to the director within thirty (30) calendar days of the date of the notice.

d. the applicant shall construct on the site at the applicant's expense, as a visual aid, a temporary frame of the proposed structure.

e. An application to build to the maximum height permitted in section 17.02.040(B)(1) of this chapter may be granted, with or without conditions, if the following findings can be made:

i. The applicant has complied with the early neighbor consultation process established by the city.

ii. The structure does not significantly impair a view from public property (parks, major thoroughfares, bike ways, walkways or equestrian trails) which has been identified in the city's general plan or coastal specific plan, as city-designated viewing areas.

iii. The proposed structure is not located on a ridge or a promontory.

iv. The structure is designed and situated in such a manner as to minimize impairment of a view.

v. There is no significant cumulative view impairment caused by granting the application. Cumulative view impairment shall be determined by: (a) considering the amount of view impairment caused by the proposed structure; and (b) considering the amount of view impairment that would be caused by the construction on other parcels of structures similar to the proposed structure.

vi. The proposed structure, when considered exclusive of existing foliage, does not significantly impair a view from the viewing area of another parcel. If the viewing area is located in a structure, the viewing area shall be located in a portion of a structure which was constructed without a height variation (~~modification~~) permit or variance, or which would not have required a height variation or variance when originally constructed had this section, as approved by the voters on november 7, 1989, been in effect at the time the structure was constructed, unless the viewing area located in the portion of the existing structure which required a height variation (~~modification~~) permit or variance constitutes the primary living area (living room, family room, dining room, or kitchen) of the residence.

vii. The proposed structure complies with all other code requirements.

viii. The proposed structure is compatible with the immediate neighborhood character.

ix. The proposed structure does not result in an unreasonable infringement of the privacy of the occupants of abutting residences.

f. Written notice of the director's or planning commission's decision shall be sent to the applicant, his/her representative and to all parties who responded to the original notice.

g. The decision of the director may be appealed to the planning commission by the applicant or any person who responded in writing to the director prior to the director's decision, provided the appeal is filed in writing within fifteen (15) calendar days after the date of the director's decision. The appellant shall pay an appeal fee as established by resolution of the city council.

h. Notice of the public hearing for an initial determination of a height variation application by the planning commission or an appeal to the planning commission and/or city council shall be mailed thirty (30) calendar days prior to the hearing, to property owners within five hundred (500) feet of the applicant's property, as well as any additional property owners previously determined by the city to be affected by the proposal.

i. In hearing an appeal of the director's decision, the planning commission shall grant the application and cause a permit to be issued, only if it finds that all of the requirements of section 17.02.040(C)(1)(e) of this chapter have been met.

j. A decision of the planning commission may be appealed to the city council by the applicant or any person who commented orally or in writing to the planning commission, provided the appeal is filed in writing within fifteen (15) calendar days after the date of the planning commission's decision. The appellant shall pay an appeal fee as established by resolution of the city council. In order to grant a permit, the city council must determine that all of the requirements listed in section 17.02.040(C)(1)(e) of this chapter have been met.

2. Restoration of Views Where Foliage is a Factor.

a. Any resident owning a residential structure with a view may file an application with the city for a view restoration permit. The applicant shall file with the application proof that the applicant consulted, or attempted to consult, with the property owner whose foliage is in question. The applicant shall pay a fee for the view restoration permit as established by resolution of the city council.

b. The application shall be submitted to the view restoration commission. Written notice of the time and place for the hearing on the application shall be sent to the applicant and the property owner(s) of the foliage involved at least thirty (30) calendar days prior to the meeting of the commission. Commission members shall inspect the site prior to the public hearing. Only view restoration commission members who make a site inspection may participate in the public hearing.

c. In order for a view restoration notice to be issued, the commission must find:

i. The applicant has complied with the early neighbor consultation process and has shown proof of cooperation on his/her part to resolve conflicts.

ii. Foliage exceeding sixteen (16) feet or the ridge line of the primary structure, whichever is lower, significantly impairs a view from the applicant's viewing area, whether such foliage is located totally on one property, or when combined with foilage located on more than one property.

iii. The foliage to be removed is located on property, any part of which is less than one thousand (1,000) feet from the applicant's property line(s).

iv. The foliage significantly impairing the view did not exist, as view impairing vegetation, when the lot from which the view is taken was created.

v. Removal or trimming of the foliage will not cause an unreasonable infringement of the privacy of the occupants of the property upon which the foliage is located.

vi. For property located within the boundaries of the miraleste recreation & park district, the commission shall also find the removal or trimming of the foliage strikes a reasonable balance between meeting the purposes of section 17.02.040 of this chapter, as set forth in the ordinance approved by the voters on november 7, 1989, and preserving the historical developments of the miraleste recreation & park district area with a large number of tress.

d. Should the commission make findings requiring issuance of a view restoration permit, the director shall send a notice to the property owner to trim, cull, lace or otherwise cause the foliage to be reduced to sixteen (16) feet or the ridge line of the primary structure, whichever is lower, or such limit above that height which will restore the view. The property owner will have ninety (90) calendar days to have the foliage removed. The applicant shall be responsible for the expense of the foliage removal and/or replacement ordered pursuant to this subsection only to the extent of the lowest bid amount provided by contractors licensed to do such work in the city of rancho palos verdes and selected by the applicant. If after ninety (90) calendar days the foliage has not been removed, the city of rancho palos verdes will authorize a bonded tree service to trim, cull, lace or remove the identified foliage at the owner's expense. After the initial trimming, culling, lacing or removal of the foliage, the owner, at the owner's expense, shall be responsible for maintaining the foliage so that the view restoration required by the view restoration permit is maintained.

e. To the extent legally permissible, trees or foliage on property owned by any governmental entity, except the city and the miraleste recreation & park district, shall be subject to view restoration control, as per the provisions of this section, except that the foliage shall be trimmed or removed thirty (30) calendar days following issuance of the notice. Trees and/or foliage located on city property, or in the public right-of-way, as defined in

chapter 17.96 (Definitions), shall be subject to view restoration control, as per the provisions of this section, pursuant to the city tree review permit procedure contained in section 17.76.100 (City Tree Review Permit.)

f. The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare. Such conditions or restrictions may include, but are not limited to, (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen (16) feet or the ridge line is likely to kill the foliage or to threaten the public health, safety and welfare, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause an adverse impact on the public health, safety and welfare or will adversely impact the safety or privacy of the property owner, provided that the property owner consents to the replacement.

g. The applicant, the owner of the property where the foliage is located, or any other interested person may appeal the decision of the view restoration commission to the city council by filing with the city clerk a written notice of appeal, including the grounds for the appeal, and any specific action being requested by the appellant, together with the appeal fee established by resolution of the city council, within fifteen (15) calendar days after the view restoration commission adopts the resolution setting forth its decision. The decision of the view restoration commission is final if no appeal is filed

within fifteen (15) calendar days. If such appeal is timely and properly filed, a copy of the findings of the view restoration commission and all materials on file with the director shall be transmitted to the city council, which shall be part of the appeal hearing record, together with the notice of appeal and any other written materials submitted by interested parties. Additional written materials shall be submitted to the city clerk at least seven (7) calendar days prior to the date that the appeal will be heard by the city council.

Upon receiving the notice of appeal, the city clerk shall schedule the matter for review at a forthcoming meeting of the city council. At the city council meeting, oral testimony shall be limited to five (5) minutes in length for each of the parties whose properties are affected by the decision and two (2) minutes per person for other individuals. Oral testimony shall be limited to the issues raised in the written appeal. At the conclusion of the oral presentation, the city council may do one of the following:

i. Affirm the decision of the view restoration commission and approve the application upon finding that all applicable findings have been correctly made and all provisions of section 17.02.040(C)(2) of this chapter are complied with; or

ii. Approve the application but impose additional or different conditions as the city council deems necessary to fulfill the purposes of section 17.02.040(C)(2) of this chapter; or

iii. Disapprove the application upon finding that all applicable findings cannot be made

or all provisions of section 17.02.040(C)(2) of this chapter have not been complied with; or

iv. Refer the matter back to the view restoration commission to conduct further proceedings. The remanded proceedings may include the presentation of significant new evidence which was raised in conjunction with the appeal. The city council shall state the ground(s) for the remand and shall give instructions to the view restoration commission concerning any error found by the city council in the commissions's prior determination.

Section 9: The provisions of this Ordinance shall apply to all complete view restoration permit applications on file with the City where an initial determination has not yet been made by the view restoration commission, and to all height variation permit applications submitted after the effective date of the Ordinance.

Section 10: The City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED, APPROVED AND ADOPTED this 7th day of January, 1997.

/s/ JOHN McTAGGART
MAYOR

ATTEST:

/s/ JO PURCELL
CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS
CITY OF RANCHO PALOS VERDES)

I, JO PURCELL, City Clerk of the City of Rancho Palos Verdes do hereby certify that the whole number of members of the City Council of said City is five; that the foregoing Ordinance No. 319, passed first reading on December 17, 1996, was duly and regularly adopted by the City Council of said City at a regular meeting thereof held on January 7, 1997, and that the same was passed and adopted by the following roll call vote:

AYES:	FERRARO, BYRD, HOLLINGSWORTH, LYON AND MAYOR McTAGGART
NOES:	NONE
ABSENT:	NONE
ABSTAIN:	NONE

/s/ Jo Purcell
CITY CLERK